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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT SCHNEIDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the evidence was sufficient for the trial court to find that Petitioner held a leadership role in the offense to which he entered a guilty plea under the applicable federal law both pre- and post- this Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

PARTIES TO THE PROCEEDING

The petitioner is an individual, Robert Schneider.

The Respondent is United States of America.

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OPINION BELOW

The Sixth Circuit's unpublished opinion, *United States of America v. Robert Schneider*, No. 02-4266, was filed on September 9, 2004 and is reproduced in the Appendix at [insert cite here].

JURISDICTIONAL STATEMENT

The district court obtained jurisdiction because Petitioner was indicted in that court and charged with federal offenses under 21 U.S.C. § 846 and 21 U.S.C.§§ 846/841. Petitioner entered a guilty plea to one count of conspiracy to distribute more than 1000 kilograms of marijuana. The district court imposed sentence on October 24, 2002. From that judgment and sentence, Petitioner timely filed a notice of appeal to the United States Sixth Circuit Court of Appeals. After each party submitted their briefs and oral arguments were held, the Court issued its decision overruling Petitioner's appeal to that court on September 9, 2004. This Petition is filed within 90 days of that filing date.

STATUTE INVOLVED

The United States Sentencing Guidelines § 3B1.1(c), permit the trial court to add a two-point enhancement to a defendant's guideline level if it finds that "the defendant was an organizer, leader, manager or supervisor in any criminal activity . . ."

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution reads that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On March 20, 2002, Petitioner was charged by indictment with one count (count 1) of conspiracy to distribute and possess with intent to distribute more than 1000 kilograms of marijuana (21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(A)), and one count (count 2) of attempting to possess with intent to distribute over 100 kilograms of marijuana. (21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B)).[1] (Docket, p .)

On May 3, 2002, and pursuant to plea agreement, Petitioner entered a guilty plea to the first count of the indictment, conspiracy to distribute marijuana in an amount over 1000 kilograms. (Docket, p.)

On October 24, 2002, Petitioner appeared for sentencing. At that time he objected to the suggestion in the pre-sentence report that he merited an additional two point penalty for his ringleader role in the operation. (TR 10/24/02, p. 6.) (Petitioner also filed written objections beforehand.) The trial

[1] The indictment also charged Larry Kapp, Paul Snyder and Douglas Hartman with both offenses. (Docket , p.)

court was not persuaded, and it added the additional two points. (TR 10/24/02, pp. 8-9.) The court then imposed a sentence of 57 months. (TR 10/24/02, p. 17.)

From that sentence Petitioner timely filed a notice of appeal. (Docket, p.) After submission of briefs and oral argument, the Sixth Circuit issued its decision affirming the trial court's decision. Petitioner believes that the trial court could not have found that he held a leadership role in the offense by a preponderance of the evidence, let alone beyond a reasonable doubt, which Petitioner believes is the appropriate burden based on this Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

STATEMENT OF FACTS

Petitioner will briefly summarize the facts as those facts are reflected in the probation report.

On March 11, 2002, James Reak was driving in Arizona with 700 pounds of marijuana when Arizona authorities discovered marijuana. Reak had been hired by co-defendant Kapp to drive the marijuana from Arizona to Ohio. Reak cooperated with the authorities, and agreed to continue driving the marijuana to appellant in Ohio. On March 13, 2002, appellant and co-defendant Hartman drove to Cincinnati to meet Reak. Petitioner brought $10,000 to pay Reak. Schneider and Hartman were arrested in Cincinnati.

Schneider and Hartman had been friends since they were in elementary school. Hartman's involvement consisted of helping appellant pick up the delivery in Cincinnati. Hartman had done this twice before, and appellant paid him $5,000 per trip. They would then transport the marijuana back to Dayton, where it was stored in Petitioner's house.

Search warrants were executed at Hartman and Petitioner's houses. In Petitioner's house officers found 25

pounds of marijuana and $661,489 in cash. Officers found scales and $295,550 in Hartman's house. That money was attributed to Petitioner. Search warrants executed in Arizona, at co-defendant Kapp's and Snyder's houses, revealed more currency and marijuana.

Petitioner met Paul Snyder in August of 1999. Snyder had been driving loads of marijuana from Arizona to Ohio, to a person named Bob Barker. But at some point after they met, Snyder made the deliveries to Petitioner directly. Petitioner would pay Snyder for the marijuana and then resell it. When Snyder was arrested and jailed in Missouri, James Meagan made the deliveries to Petitioner. After that, codefendant Kapp began making the deliveries. For the last three trips, Kapp hired James Reak to make the deliveries. (Docket, pp.)

SUMMARY OF ARGUMENT

Petitioner contends that the evidence to support the "leader, organizer, manager or supervisor" of the drug activity enhancement was insufficient. The evidence showed that codefendant Hartman helped Petitioner commit this offense. However, the evidence also shows that Hartman was also an old friend of Petitioner and that his assistance was based more on this friendship than on some "employer/employee" relationship. Thus, Petitioner contends that the district court erred in concluding that the "managerial" two point sentencing factor should apply. Petitioner further contends that the rule set forth in *Blakely v. Washington*, issued before Petitioner filed his appeal to the Sixth Circuit, indicates that this leadership role must have been proved beyond a reasonable doubt to comport with Sixth Amendment requirements, and that this burden was not met when the trial court found that enhancement appropriate. Currently, the Circuits are in conflict regarding whether *Blakely* applies at all to the United States Sentencing Guidelines. As such, this case meet the Supreme Court's jurisdictional standard because it presents an issue of

significant public and legislative interest and would alleviate aforementioned conflict among the appellate courts. *See, e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 614-615 (1974).

ARGUMENT

THE TRIAL COURT ERRED WHEN IT ENHANCED PETITIONER'S SENTENCE BASED ON THE CONTENTION THAT HE WAS AN ORGANIZER, LEADER, MANAGER OR SUPERVISOR OF THE ILLEGAL ACTIVITY.

When it imposed sentence, the trial court added an additional two points under U.S.S.G. § 3B1.1(c). That section calls for the imposition of an additional two points "if the defendant was an organizer, leader, manager or supervisor in any criminal activity . . ." To support that sentencing factor, the trial court noted that the PSR stated that co-defendant Hartman had indicated that Petitioner called upon Hartman to safeguard the drug proceeds and to act as his chauffeur. The court noted further that Petitioner received the "lion's share" of the proceeds and that Hartman received only "small sums." Thus, the court concluded that Hartman was Petitioner's employee and that Petitioner was in fact a manager. (Judge Beckwith, TR, 10/24/02, pp. 8-9.) Petitioner objected to the imposition of the enhancement. In this appeal, Petitioner maintains that the district court erred in concluding that Petitioner played a managerial role in this offense.

When reviewing federal sentencing guidelines, an appellate court reviews the sentencing court's factual findings for clear error. *United States v. Clements*, 144 F.3d 981, 982 (6th Cir. 1998.) The district court's application and interpretation of the guidelines are reviewed *de novo*. *United States v. Barton*, 100 F.3d 43, 44 (6th Cir. 1996.) (See also *United States v. Caseslorente*, 220 F.3d 727, 734 (6th Cir. 2000)).

The sentencing guidelines do not define the terms, "organizer," "leader," "manager," or "supervisor." However, the guidelines do set out a number of factors that a court should consider when evaluating whether this enhancement should apply in a particular case. These factors include: a) the exercise of decision-making authority; b) the nature of participation in the commission of the offense; c) the recruitment of accomplices; d) the claimed right to a larger share of the fruits of the crime; e) the degree of participation in planning or organizing the offense; f) the nature and scope of the illegal activity; and g) the degree of control and authority exercised over others. U.S.S.G. § 3B1.1 Application Note 4. A background comment to the guidelines also better explains when this enhancement should or should not be imposed.

> "This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/ or are more likely to recidivate." USSG § 3B1.1, comment. (backg'd.).

A sentence should not be enhanced under this provision unless the defendant led, organized, managed, or supervised at least one other criminally culpable individual. *United States v. Caseslorente*, *supra*, 220 F.3d at p. 736. It is not enough that a defendant played an important and crucial role in the offense. Instead, the record must show that he or she exercised managerial control over at least one other participant. *United States v. Vandeberg*, 201 F.3d 805, 811-812 (6th Cir. 2000); *United States v. Albers*, 93 F.3d 1469, 1487 (10th Cir. 1996). Under old Supreme Court jurisprudence on this issue, the government bore the burden of proving this enhancement by a preponderance of the evidence. *United States v. Martinez*, 181 F.3d 794, 797 (6th Cir. 1999).

On June 24, 2004, the United States Supreme Court issued their decision on the case *Blakely v. Washington*, 542 U.S. ____, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In that decision, the Supreme Court committed to and expanded upon the rule set forth in *Apprendi v. New Jersey*, which stated that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The *Blakely* court elaborated on *Apprendi* by specifically stating that the statutory maximum is the "maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at ____. Its decision reflects the importance of a person's Sixth Amendment right to trial by jury, to make sure the State proved beyond a reasonable doubt those facts used to convict and sentence a person.

Factually, *Blakely* involved a Washington statute directing that a person convicted of a class B felony cannot be sentenced to more than ten years unless one or more elsewhere-enumerated statutory factors are present. *Blakely*, 542 U.S. at ____. Blakely entered a guilty plea to facts establishing the elements of second degree kidnaping, a class B felony, as well as domestic violence and using a firearm. *Id.* The judge imposed a sentence exceeding the statutory maximum by three years after finding that one of the statutorily enumerated aggravating factors, acting with "deliberate cruelty" was present. Blakely appealed the sentence on the basis that the judge "deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence."

As noted above, the different federal courts of appeal are in conflict concerning the issue of whether *Blakely* applies at all to the United States Sentencing Guidelines. *United States v. Hammoud*, 381 F.3d 316, 345 (4th Cir. 2004). "The Seventh and Ninth Circuits have ruled that *Blakely* does

impact the guidelines. See *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2004); *United States v. Booker*, 375 F.3d 508, 511 (7th Cir. 2004), cert. granted, 73 U.S.L.W. 3073 (U.S. Aug. 2, 2004) (No. 04-104). In contrast, the Fifth and Sixth Circuits have held that *Blakely* does not affect the guidelines. See *United States v. Koch*, 2004 WL 1870438, at *1 (6th Cir. Aug. 13, 2004) (en banc); *United States v. Pineiro*, 377 F.3d 464, 465-66 (5th Cir. 2004). The Second Circuit certified questions regarding the application of *Blakely* to the guidelines to the Supreme Court, see *United States v. Penaranda*, 375 F.3d 238, 247 (2nd Cir. 2004), but in the meantime has declined to apply *Blakely* to the guidelines, see *United States v. Mincey*, 2004 WL 1794717, at *3 (2nd Cir. Aug. 12, 2004) (per curiam). Other circuits have acknowledged the potential impact of *Blakely* on the guidelines but have not directly addressed the question. *See, e.g., United States v. Duncan*, 2004 WL 1838020, at *3-*5 (11th Cir. Aug. 18, 2004); *United States v. Cianci*, 378 F.3d 71, 107 (1st Cir. 2004)..." *Id.*

The *Apprendi* rule is based on "two longstanding tenets" of legal thought, that the verity of each charge against a criminal defendant must be "confirmed by the unanimous suffrage of twelve of his equals and neighbors," 4 W. Blackstone, Commentaries on the Law of England 343 (1769), and that an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason. 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d Ed. 1872)." *Id.* As the Court noted, that rule and the Court's adherence to it in *Blakely* reflects a commitment to precedent, but more importantly to "the need to give intelligible content to the right of jury trial." *Id.* The Court compared the importance of the right to have a jury vote on a person's verdict to the right to vote - both essential to the people's right to maintain power and control over the activities in the branches of government. Specifically, Justice Scalia stated that the right of jury trial "is no mere procedural

formality, but a fundamental reservation of power in our constitutional structure." *Id.* For support, he cited the works of James Madison and Thomas Jefferson, among others. Not giving substance to the jury's power to restrict the scope of a judge's sentencing authority would derogate the Framers' intentions in awarding it. They vested that power in the jury precisely because they felt the government could not be trusted to determine the jury's role for them. As the Court stated, "[t]he jury could not function as a circuit breaker in the State's machinery if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." *Id.*

Petitioner believes that the trial court overlooked the true nature of his and Hartman's relationship. The two men were first and foremost friends, and they had been so since they attended elementary school together. Thus, the fact that Hartman may have helped Petitioner pick up marijuana deliveries, that Hartman was paid for his assistance, and that Petitioner made most of the money, should, Petitioner submits, be seen in the context of that friendship. Petitioner believes that the record better supports the view that this was a case of one friend helping another, and not the "employer/employee" relationship that the trial court seemed to find.

In addition, the overall concern behind imposing this sentencing factor is with the concept of "relative responsibility." USSG § 3B1.1, comment. (backg'd). In this case four people were indicted and convicted. Two lived in Arizona and two, appellant and Hartman, lived in Ohio. There is no suggestion from the PSR that either Snyder or Kapp had any dealings with Hartman. Yet both Snyder and Kapp appeared to be equally involved in the operation with Petitioner. Thus, it would seem that even though Kapp and Snyder were just as involved (if not more involved) in this scheme as Petitioner, they will not be subject to this two point

addition by virtue of the fact that they happened not to have friends assisting them. Petitioner asserts that it is fundamentally unfair that he could receive a potentially longer sentence than his two equally culpable codefendants. And when seen in the context of just Petitioner, Snyder and Kapp, the evidence shows that Petitioner: a) had no more decision making authority then they did; b) had equal if not lesser participation in the offense; c) claimed an equal right to the proceeds; d) had equal participation in planning and organizing the offense; e) had the same nature and scope of activity; and f) exercised equal control or authority. U.S.S.G.§ 3B1.1 Application Note 4. Thus, with respect to the "relative responsibility" element, Petitioner, Snyder and Keen should be on the same level.

Further, while it is understandable, in theory, that a person in a managerial role might present a greater danger to the public and might be more likely to recidivate (see U.S.S.G. § 3B1.1, comment. (backg'd)), the chance of either in this case is far less likely. It is not as if appellant went out on the street and recruited and trained a stranger to help him import marijuana, something that might suggest and organizational ability and simply more gaul than a "typical" drug trafficker. Instead, Petitioner relied on a trusted friend to help him, in a most minimal way, with his business. Thus, Petitioner submits that this pre-existing friendship fails to suggest any greater danger to the public than typical, and he also submits that it fails to indicate a greater chance of recidivism.

Finally, it should be noted that pursuant to the plea agreement, the government did not object to Petitioner receiving the "safety valve" benefits of 18 U.S.C.§ 3553(f). (Robert C. Brichler, TR, 5/3/02, p. 14.) That necessarily means that the government did not object to the probation department or the trial court concluding that Petitioner did not play a managerial role in this offense. 18 U.S.C. § 3553(f)(4). Petitioner recognizes that the prosecution's statements are not

binding on the trial court or this Court. However, he submits that the government's view is just one more indication that Petitioner did not in fact play a managerial role in this offense.

Thus, Petitioner submits that when this Court reviews the district court's decision to impose the managerial two point enhancement, it will conclude that it was incorrect.

CONCLUSION

For the reasons stated in the foregoing brief, the sentence should be reversed and the matter remanded for re-sentencing, with the instruction that Petitioner may not be classified leader in the operation.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case Nos. 02-4216, 02-4266

[Filed September 09, 2004]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
LARRY KAPP (02-4216), ROBERT SCHNEIDER (02-4266), Defendants-Appellants.	)

Before: BATCHELDER and GIBBONS, Circuit Judges; COHN, District Judge.[1]

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

Defendants-appellants Larry Kapp and Robert Schneider were indicted in the United States District Court for the

[1] The Honorable Avem Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

Southern District of Ohio for conspiracy to distribute and conspiracy to possess with intent to distribute in excess of 1,000 kilograms of marijuana, in violation of 21 U.S.C. § 846, and for attempt to possess with intent to distribute in excess of 100 kilograms of marijuana, in violation of 21 U.S.C. § 846. Kapp and Schneider pled guilty to the conspiracy charge. On appeal, Kapp argues that the district court erred by not departing downward from the statutory minimum sentence to the extent requested by Kapp and the government. Schneider argues that the district court erred in applying a sentence enhancement for his role in the offense. With regard to Kapp, we find that we have no jurisdiction to consider his claim. With regard to Schneider, we affirm the district court's decision to enhance his sentence based on his role in the offense.

I

The factual basis for the charges was accurately summarized by the district court as follows:

Beginning in November 2001, Larry Kapp, Paul Snyder, Robert Schneider, and Douglas Hartman conspired with each other and others to distribute marihuana in the Southern District of Ohio and the Eastern District of Kentucky. Larry Kapp and Paul Snyder lived in the Tucson, Arizona area where they would obtain 500 to 700 hundred [sic] pound shipments of marihuana for Robert Schneider in Dayton, Ohio and other conspirators in northern Kentucky. Kapp hired a courier named James Reak to assist him in transporting the marihuana. Paul Snyder would prepare the marihuana for shipment by wrapping it and then loading it in pickup trucks for shipment. Kapp and Reak would drive the marihuana to Ohio using two vehicles, one to carry the marihuana and the other to watch for police activity. Once the marihuana reached

Dayton, Ohio Kapp and Reak would check into a motel and notify Robert Schneider. The marihuana would be given to Robert Schneider who would pay Kapp and then distribute it to customers in the Southern District of Ohio. Douglas Hartman was hired by Robert Schneider to assist him in transporting the marihuana from the motel lots to Schneider's home in Dayton, Ohio. Robert Schneider had a special climate controlled room built in his garage which he used to store the marihuana until it was sold.

Reak made three of these trips to Ohio. The first two trips were made with Larry Kapp and the marihuana was successfully delivered. On the last trip, March 11, 2002, Reak was transporting 700 pounds of marihuana alone when he was arrested by the Arizona Department of Public Safety after a traffic stop. Reak cooperated with the police and agreed to assist them by delivering the marihuana as intended. Reak made recorded telephone calls to Larry Kapp, Paul Snyder, and Robert Schneider during which the progress of the intended delivery was discussed.

On March 13, 2002, Robert Schneider and Douglas Hartman drove to Cincinnati in separate vehicles to meet Reak at a motel to pick up the marihuana. Schneider brought $10,000 in cash to pay Reak for driving the marihuana. They were arrested after they met Reak and loaded the marihuana into Schneider's vehicle.

Search warrants were obtained in Dayton for Robert Schneider's and Douglas Hartman's homes. In Schneider's home the police found about 25 pounds of marihuana, and $661,489.00 in cash, the proceeds from the sale of marihuana. In Hartman's home police found scales and $295,550.00 in cash that Hartman was holding for Robert Schneider.

At the same time search warrants were obtained in Tucson, Arizona for the homes of Larry Kapp and Paul Snyder. Police seized $7,000.00 in cash from Kapp and approximately $33,000.00 in cash from Paul Snyder. Kapp voluntarily took police to a location where he was holding over $1,100,000.00 in cash that he owed to his supplier. The money was turned over to Arizona authorities for forfeiture. In addition Arizona police seized 1100 pounds of marihuana from a stash house utilized by Kapp and Paul Snyder.

At sentencing, Kapp's base offense level was determined to be 32, due to the quantity of marijuana involved. The district court granted a two level decrease in Kapp's offense level pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 3E1.1(a) because he accepted personal responsibility for his criminal conduct. The court also granted a one level decrease pursuant to U.S.S.G. § 3E1.1(b) because he timely notified the government of his intention to plead guilty.

The government moved for a further five level reduction pursuant to U.S.S.G. § 5K1.1 because Kapp provided substantial assistance to the United States. The district court agreed that a reduction was appropriate but ultimately did not depart from the sentencing guidelines to the requested extent for two reasons. First, the court stated that "although the Court does recognize the Defendant's cooperation with the government, his past conduct, which as further explained below involves substantial contact with law enforcement and the criminal justice system, weighs against granting the full departure sought by the government." Second, the court found that Kapp's continued drug use while on bond prior to sentencing compromised his value as a witness for the prosecution in future cases. For both of these reasons, the

court declined to grant the full downward departure requested by the government.

Kapp's presentence investigation report assigned him three criminal history points, placing him in criminal history category II. Prior to sentencing, however, the court notified the parties that it was considering an upward departure from criminal history category II because it believed that the "information contained in the presentence investigation report indicated that criminal history category II both understates the seriousness of the Defendant's past criminal conduct and the likelihood that he will commit other crimes in the future." Nevertheless, the district court ultimately declined to depart upward with regard to Kapp's criminal history category, stating, "although we have our suspicions, the Court cannot, however, say that Defendant's criminal history score is understated. Therefore, the Court will not upwardly depart from criminal history category II."

Kapp's offense level of 29 and criminal history category of II provided a sentencing range of 87 to 108 months. However, the statutory minimum sentence for the offenses for which Kapp was convicted was 120 months. Under U.S.S.G. § 5G1.1 (b), if the statutory minimum sentence exceeds the maximum guideline sentence, the statutory minimum becomes the guideline sentence. Therefore, Kapp's guideline sentence was 120 months. The prosecution filed a motion for a downward departure from the guideline range under U.S.S.G. § 5K1.1. The prosecution asked that Kapp be sentenced at offense level 24. The district court declined to depart downward to the extent requested by the government, finding that "a 24 month reduction from the mandatory minimum is an appropriate sentence in this case." The court therefore sentenced Kapp to 96 months imprisonment, 24 months below the statutory minimum of 120 months.

At sentencing, Schneider's base offense level was determined to be 30, due to the quantity of marijuana involved. Schneider's presentence report recommended that he be assessed two points pursuant to U.S.S.G. § 3B1.1(c) because of his role as an organizer, leader, manager, or supervisor in the criminal activity.

Schneider objected to this enhancement, but the district court overruled his objection and assessed the two points, bringing his offense level to 32 and his guideline range to 87 to 108 months. Schneider argues that the co-conspirator he allegedly supervised, Douglas Hartman, was simply a friend, and that their activities were a natural extension of their prior friendship, not evidence of a supervisory relationship. The district court disagreed, reasoning that

> the Defendant's relationship with Hartman as it related to the criminal conspiracy transcended friendship. The Defendant recruited Hartman into the conspiracy and directed Hartman's activities. For instance, Hartman safeguarded the Defendant's drug proceeds at the Defendant's request and acted as the Defendant's chauffeur. As compared to Hartman, the Defendant by far claimed the lion's share of proceeds from the drug trafficking conspiracy. The Defendant acted as paymaster, giving Hartman relatively small sums in comparison to the substantial revenue generated from the conspiracy. The Court agrees with the probation officer's conclusion that Hartman acted as the Defendant's employee and that the Defendant was his manager.

The district court then granted a two level decrease in Schneider's offense level pursuant to U.S.S.G. § 3E1.1(a) because he accepted personal responsibility for his conduct,

and a one level reduction pursuant to U.S.S.G. § 3E1.1 (b) because he timely notified the government of his intention to plead guilty and provided complete information regarding his role in the offense. The district court then granted the prosecution's motion for a downward departure of four more levels under U.S.S.G. § 5K1.1 because of Schneider's substantial assistance, bringing Schneider's offense level to 25. The district court placed Schneider in criminal history category I. The sentencing guidelines establish a range of 57 to 71 months imprisonment based on a total combined offense level of 25 and a criminal history category of I. The district court sentenced Schneider to 57 months imprisonment.

II.

The district court's factual findings on guideline sentencing issues are reviewed for clear error. *United States v. Clements*, 144 F.3d 981, 982 (6th Cir. 1998). The court's application of the guidelines to a particular set of facts is reviewed *de novo*. *United States v. Barton*, 100 F.3d 43, 44 (6th Cir. 1996).

III.

A. Kapp

Kapp challenges the district court's decision not to depart downward from the sentencing guidelines to the extent requested by the prosecution. Sentencing decisions of the district courts are reviewable as provided by 18 U.S.C. § 3742. This provision authorizes review of a sentence that (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is greater than the sentence specified in the applicable guideline range; or (4) was imposed for an offense for which

there is no sentencing guideline and is plainly unreasonable. 18 U.S.C. § 3742(a) (2004). However, as the Supreme Court has recognized, this provision "does *not* authorize a defendant to appeal a sentence where the ground for appeal consists of a claim that the district court abused its discretion in refusing to depart." *United States v. Ruiz*, 536 U.S. 622, 627, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002).

Sixth Circuit precedent is consistent with *Ruiz*. This court stated in *United States v. Byrd*, 53 F.3d 144, 145 (6th Cir. 1995), "the refusal of a district judge to make a downward departure is not ordinarily appealable." "Where...the guideline range was properly computed, the district court was not unaware of its discretion to depart from the guideline range, and the sentence was not imposed in violation of law or as a result of an incorrect application of the guidelines, the failure to depart is not cognizable on appeal under 18 U.S.C. § 3742(a)." *Id.* (quoting *United States v. Davis*, 919 F.2d 1181, 1187 (6th Cir. 1990)); *see also United States v. Welch*, 97 F.3d 142, 152 (6th Cir. 1996) ("When the District Court is aware of its discretion to depart from the guidelines, failure to do so is not appealable.") Additionally, in *United States v. Gregory*, 932 F.2d 1167 (6th Cir. 1991), this court specifically considered the issue of whether it has jurisdiction to hear an appeal based on the degree of a district court's downward departure. We held that "this court should not accept jurisdiction over appeals based on factors which the appellant argues should have influenced the degree of a downward departure," but recognized that a defendant may still appeal a sentence imposed in violation of the law or as a result of an incorrect application of the sentencing guidelines. *Id.* at 1169.

Applying these rules, we find that this court does not have jurisdiction to review the district court's refusal to depart downward from the mandatory minimum sentence to the

extent requested by Kapp. Under U.S.S.G. § 5K1.1, a sentencing court may depart downward from the guidelines "upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense..." In this case, Kapp's mandatory minimum sentence for his offense was 120 months. The government requested that the district court depart downward by 60 months. Ultimately, the court departed downward by 24 months and sentenced Kapp to 96 months.

Kapp argues that this smaller than requested downward departure was based on an incorrect application of the sentencing guidelines. Specifically, he argues that the district court improperly considered numerous arrests in Kapp's past for which he was not convicted. The sentencing court, however, is explicitly allowed to consider such prior criminal conduct in determining the defendant's criminal history score, even where the conduct did not result in a conviction. U.S.S.G. § 4A1.3(a)(2)(E). The district court considered raising Kapp's criminal history category to III but ultimately decided not to do so. Thus, there was no incorrect application of the sentencing guidelines with regard to Kapp's criminal history category. The district court made two lengthy statements explaining its rationale for the sentence imposed:

> I am granting the motion, but not to the extent recommended by the government. I am departing below the 120-month statutory minimum, and so Mr. Kapp is getting two years off of his sentence as a result of his cooperation. But I still have serious concerns about the length of his record, past record, the nature of his past record, his behaviors prior to sentence and subsequent to his plea of guilty. All of this indicates to me that he needs a lengthy sentence to

> drive home the point that he is in a very serious situation here and must turn his life around. I don't think three-and-a-half years actual incarceration is sufficient considering the magnitude of this marijuana distribution group.
>
> . . .
>
> I've got a situation here where over a million dollars was confiscated. This is not some small-time, small level of sales. And you've implied to me that your client was not a methamphetamine user prior to his involvement with law enforcement before the sentencing date. He seems to be the kind of person that will take almost anything that's lying around if you just put the gloss on it that [it's] an illegal substance.
>
> He does have a serious problem, and I think he needs to be in a place where he can't get to any illegal drugs and where he can get treatment.

In sum, Kapp's sentence was below the mandatory minimum. He has presented no evidence of any incorrect application of the sentencing guidelines. His principal argument is that his high level of cooperation entitles him to a greater reduction. For that reason, we have no jurisdiction to review the sentencing judge's discretionary decision to sentence Kapp to a term shorter than the mandatory minimum.

B. Schneider

Schneider argues that the district court erred when it raised his offense level by two points for his role in the offense. At sentencing, the district court raised Schneider's

offense level by two points under U.S.S.G. § 3B1.1(c), which allows the sentencing court to increase the defendant's offense level if he was "an organizer, leader, manager, or supervisor in any criminal activity..." The sentencing guidelines provide guidance regarding the type of conduct that will trigger this enhancement. Application Note 4 to U.S.S.G. § 3B1.1 provides:

> In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision-making authority, the nature of participation in the commission of the offense, recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.

As Schneider correctly points out, a sentence should not be enhanced under this provision unless the defendant actually organized, led, managed, or supervised at least one other individual. *United States v. Caseslorente*, 220 F.3d 727, 736 (6th Cir. 2000). It is not enough that the defendant played an important role in the offense. *United States v. Vandeberg*, 201 F.3d 805, 811-12 (6th Cir. 2000). Schneider argues that the district court mischaracterized his relationship with co-conspirator Douglas Hartman. He argues that their relationship was merely a friendship. He asserts that they "were first and foremost friends, and they had been so since they attended elementary school together. Thus, the fact that

Hartman may have helped Schneider pick up marijuana deliveries, that Hartman was paid for his assistance, and that Schneider made most of the money should...be seen in the context of that friendship."

The district court disagreed with Schneider's characterization of the relationship. In applying the § 3B1.1 standard, the district court observed that

> the Probation Officer in the investigation report indicated, and Mr. Hartman personally said at the time of his sentencing, that Mr. Schneider called upon Mr. Hartman to help him safeguard his drug proceeds and act as Mr. Schneider's chauffeur.
>
> Mr. Schneider, by far, claimed the lion's share of proceeds from this drug trafficking conspiracy. He acted as the paymaster. He gave Hartman small sums, in comparison to the substantial revenue generated from the conspiracy.
>
> In my opinion, based on what has been adduced in the record, Mr. Hartman acted as Mr. Schneider's employee and Mr. Schneider was Mr. Hartman's manager. I think the two-level increase is appropriate. The record plainly supports that Mr. Schneider was the manager of essentially the entire scheme, so that objection is overruled.

Schneider does not claim on appeal that these findings of fact were clearly erroneous. Rather, he simply disputes what kind of relationship they evidence. However, it is evident that the factors outlined in Application Note 4 are satisfied. The district court's factual findings were not clearly erroneous, and its application of the guidelines to its factual findings was

correct. Therefore, it was not error for the district court to raise Schneider's offense level by two points based on this guideline.

Finally, Schneider makes an additional legal argument that the district court erred by relying on Application Note 4 when determining whether he was a supervisor within the meaning of U.S.S.G. § 3B1.1 (c). The guideline at issue is divided into three subsections. U.S.S.G. § 3B1.1(a) provides that if a person was an organizer or leader of criminal activity that involved five or more persons or was otherwise extensive, he will receive a four point increase. U.S.S.G. § 3B1.1(b) provides that if a person was a manager or supervisor of such activity he will receive a three point increase. U.S.S.G. § 3B1.1(c) provides that if the defendant was an organizer, leader, manager, or supervisor in any other criminal activity he will receive a two point increase.

Schneider contends that Application Note 4 applies only to subsections (a) and (b), and therefore the district court erred by relying on it to interpret the meaning of "organizer, leader, manager, or supervisor" in subsection (c). Schneider puts forth no authority for this contention. It appears from a plain reading of the provision that the note provides relevant information for the interpretation of all three subsections. Therefore, the district court did not err in relying on it.

IV.

For these reasons, we find that we have no jurisdiction to consider Kapp's assertion that the district court erred in not departing further below the mandatory minimum sentence. We also affirm the district court's enhancement of Schneider's sentence for his role in the offense.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. CR-1-02-0023-003

[Filed October 24, 2002]

United States of America, Plaintiff,	)
v.	)
Robert Schneider, Defendant.	)

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

The Defendant appeared with counsel, Jon Paul Rion, Esq., before this Court for sentencing on October 24, 2002.

The Defendant has entered a guilty plea to Count 1 of the Indictment. Accordingly, the Defendant is adjudged **GUILTY** of **COUNT I: CONSPIRACY TO DISTRIBUTE IN EXCESS OF ONE THOUSAND KILOGRAMS OF MARIJUANA** in violation of Title 21, Sections 846(a) (1) and 841(a) (1) & (b) (1) (B) of the United States Code.

The Defendant is sentenced as provided in pages 1 through 8 of this Judgment pursuant to the Sentencing Reform Act of 1984 and the United States Sentencing Guidelines ("U.S.S.G.") as follows:

The Defendant is hereby sentenced to imprisonment for a period of **FIFTY-SEVEN (57) MONTHS**;

Upon the conclusion of the sentence of imprisonment, the Defendant shall serve a term of **FOUR (4) YEARS** supervised release. During the term of supervised release, the Defendant shall be subject to the following standard conditions of supervised release for the Southern District of Ohio:

(1) the Defendant shall not commit another federal, state, or local crime;

(2) the Defendant shall not leave this judicial district without permission of the Court or probation officer;

(3) the Defendant shall report to the probation officer as directed by the probation officer or the Court and shall submit a truthful and complete written report within the first five days of each month;

(4) the Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(5) the Defendant shall meet family responsibilities;

(6) the Defendant shall work regularly at a lawful occupation unless excused by the probation officer

for schooling, training, or other acceptable reasons;

(7) the Defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

(8) the Defendant shall refrain from the excessive use of alcohol, and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

(9) the Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

(10) the Defendant shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(11) the Defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(12) the Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(13) the Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and

(14) the Defendant shall notify third parties of risks that may be occasioned by the Defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the Defendant's compliance with such notification requirement;

In addition to the standard conditions of supervised release, the following special conditions shall apply:

(I) the Defendant shall obey all federal, state, and local laws;

(2) the Defendant shall not own a firearm or other dangerous device;

(3) the Defendant shall not possess a controlled substance, and must submit to one drug test within 15 days of release and at least two periodic drug tests thereafter;

(4) the Defendant shall undergo substance abuse assessment and comply with any treatment, including urinalysis, recommended by the probation officer;

(5) the Defendant shall pay any unpaid balance of his fine;

The Defendant shall pay immediately a $10,000 fine. If the Defendant is unable to pay the fine immediately, he may do so through the Bureau of Prisons Inmate Financial Responsibility Program. The Defendant shall pay any unpaid balance of his fine during the term of supervision at a rate and

schedule recommended by the probation officer and approved by the Court.

The Defendant shall pay immediately a $100 special assessment.

REASONS FOR SENTENCE

Pursuant to Title 18 U.S.C. § 3553 and by a preponderance of the evidence the Court makes the following findings significant to the imposition of the sentence:

The Defendant is guilty of a violation of 23 U.S.C. §§ 846 and 841(a) (1) & (b) (1) (B) and is, therefore, subject to up to forty years of imprisonment, with a mandatory minimum sentence of five years, a maximum fine of $2,000,000, at least four years of supervised release, and a mandatory $100 special assessment, in all other respects, the United States Sentencing Guidelines control the calculation of sentence in this case;

The guideline for a violation of 21 U.S.C. §§ 846 and 841(a) (1) & (b) (1) (B) is found at U.S.S.G. § 2D1.1. According to U.S.S.G. § 2Dl.l(a) (3), the base offense level is determined by the Drug Quantity Table found at U.S.S.G. § 2D1.1(c).

The total amount of marijuana involved in the Defendant's offense was 952.56 kilograms;

Because the amount of marijuana involved in the Defendant's offense was more than 700 kilograms but less than 1,000 kilograms, application of U.S.S.G. § 2Dl.l(c) (5) establishes a base offense level of 30;

There is a two-level increase in offense level under U.S.S.G. § 3Bl.l(c) because the Defendant was an organizer, leader, manager, or supervisor of criminal activity.

A two-level decrease in the offense level is appropriate pursuant to U.S.S.G. § 3El.l(a) because the Defendant has accepted personal responsibility for his criminal conduct;

A one-level decrease in the offense level is appropriate pursuant to U.S.S.G. § 3El.l(b) because he timely notified the government of his intention to plead guilty and has provided complete information regarding his role in the offense.

The Defendant's adjusted offense level is 29;

The government has moved for a four-level reduction in the offense level pursuant to U.S.S.G. § 5K1.1 because the Defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. That motion is well-taken and is **GRANTED**.

Accordingly, the Defendant's final offense level is 25.

The Defendant objects to the two-level enhancement pursuant to U.S.S.G. § 3Bl.l(c) for being a leader, organizer, manager or supervisor of criminal activity. The probation officer found that this enhancement was warranted because the Defendant directed the activities of co-Defendant Douglas Hartman. The Defendant argues that Hartman's role in the offense, and his relation to Hartman, was simply a natural extension of their prior relationship. The Defendant suggests that a more appropriate apportionment of responsibility in the instant crime would be shown by giving Hartman a reduction

for a minor role in the offense, rather than giving him an enhancement for aggravating conduct. The Court disagrees.

The Application Note 4 to U.S.S.G. § 3B1.1 provides in pertinent part:

> In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1, Application Note 4. As recounted by the probation officer in the presentence investigation report, the Defendant's relationship with Hartman as it related to the criminal conspiracy transcended friendship. The Defendant recruited Hartman into the conspiracy and directed Hartman's activities. For instance, Hartman safeguarded the Defendant's drug proceeds at the Defendant's request and acted as the Defendant's chauffeur. As compared to Hartman, the Defendant by far claimed the lion's share of proceeds from the drug trafficking conspiracy. The Defendant acted as paymaster, giving Hartman relatively small sums in comparison to the substantial revenue generated from the conspiracy. The Court agrees with the probation officer's conclusion that Hartman acted as the Defendant's employee and that the Defendant was his manager. Therefore, a two-level enhancement pursuant to U.S.S.G. § 3B1.1(c) is warranted. *See, e.g., United States v. Lewis*, 68 F.3d 987,

989 (6th Cir. 1995) ("Defendant's claim that she was not an organizer, leader, manager, or supervisor' can be disposed of quickly, since the record plainly supports the district court's finding that defendant masterminded the entire scheme, selected the women to approach the casino cashier, instructed them how to proceed, and then compensated them for successfully redeeming the coupons."). Accordingly, the Defendant's objection is not well-taken and is **OVERRULED**.

The United States objects to paragraph 32 of the PSI. Paragraph 32 of the PSI holds the Defendant responsible for only 2,100 pounds of marijuana. The United States argues that the Defendant should be held accountable for an additional 1,100 pounds of marijuana that was being held by Co-Defendant Larry Kapp as readily foreseeable conduct. As the probation officer correctly points out, there is no evidence on this record that Mr. Kapp was retaining this additional amount of marijuana for sale to the Defendant. It is just as likely that this quantity of marijuana was simply a part of Mr. Kapp's inventory to be sold to buyers other than the Defendant. Accordingly, the government's objection to paragraph 32 is not well-taken and is **OVERRULED**.

The Defendant has no points for his prior criminal history, placing him in criminal history category I;

The Sentencing Guidelines establish a range of fifty-seven (57) to seventy-one (71) months of imprisonment based on a total combined offense level of 25 and a criminal history category of I.

The Defendant's imprisonment range falls within Zone D of the Sentencing Table; pursuant to U.S.S.G. § 5C1.1(f), the

minimum term of imprisonment shall be satisfied by a term of actual imprisonment;

Pursuant to 21 U.S.C. §§ 841(a) (1) and (b) (1) (B), a minimum term of four years supervised release is authorized;

A maximum fine of $2,000,000 is applicable by statute; pursuant to U.S.S.G. § 5E1.2(c) (3) & (4), the fine range for the Defendant's offense is $10,000 to $2,000,000;

Accordingly, the Defendant is fined $10,000;

The Defendant shall be ordered to pay immediately a $100 special assessment in accordance with U.S.S.G. § 5E1.3;

Pursuant to the plea agreement and under 21 U.S.C. § 853(a), the Defendant has forfeited all of his right, title and interest in the following property:

1. Ten thousand dollars in United States currency ($10,000.00) seized on March 13, 2002 at the time of the Defendant's arrest;

2. Six hundred sixty-one thousand four hundred eighty-nine dollars in United States currency ($661,489.00) seized from the Defendant's residence on March 13, 2002;

3. Two hundred ninety-five thousand five hundred fifty dollars in United States currency ($295,550.00) seized from the residence of Douglas Hartman on March 13, 2002;

4. Fourteen thousand two hundred five dollars and twenty-six cents in United States currency ($14,205.26) seized

from National City Bank account #2831468 in the name of Robert E. Schneider;

5. Three thousand sixty-seven dollars and twenty-seven cents in United States currency ($3,067.27) seized from Standard Register Federal Credit Union account #0002066030 in the name of Urban Schneider and Robert Schneider;

6. Fifteen thousand five hundred three dollars and twenty-four cents in United States currency ($15,503.24) seized from Bank One account #1588601128 in the name of Robert E. Schneider;

7. Nine thousand six hundred ninety-five dollars and fifty-three cents in United States currency ($9,695.53) seized from Provident Bank account #2578-550 in the name of Robert E. Schneider;

8. Six thousand ninety-one dollars and ninety cents in United States currency ($6,091.90) seized from Liberty Savings Bank account #20-54014702 in the name of Robert E. Schneider; and

9. Fifty-one thousand four hundred thirty-six dollars and eighty cents ($51,436.80), the proceeds of Provident Bank check #194346317, in lieu of real property known and numbered as 2519 Walford Drive, Centerville, Montgomery County, Ohio 45440.

A more detailed PRELIMINARY ORDER OF FORFEITURE will be filed contemporaneously with this Judgment Order and will control the disposition of these assets.

The Defendant may VOLUNTARILY SURRENDER for service of sentence at the time and institution selected by the Bureau of Prisons.

The Court recommends to the Bureau of Prisons that the Defendant participate in the 500 hour Intensive Drug Treatment Program.

The Defendant is hereby notified that he has a right to appeal this sentence, and if he is unable to pay the cost of an appeal, he has the right to apply to this Court for leave to proceed *in forma pauperis*. If he is indigent and cannot retain a lawyer, he may apply, and one will be appointed to represent him in his appeal.

The Defendant is further advised that, in accordance with the provisions of Rule 4(b) of the Rules of Appellate Procedure, he must file his notice of appeal with the Clerk of the United States District Court within 10 days of the filing of this judgment, which will be filed on October 24, 2002. Therefore, the Defendant must file his notice of appeal on or before November 4, 2002. The Defendant is also advised that if he so requests, the Clerk .of this Court will prepare and file forthwith a notice of appeal on his behalf.

/s/ Sandra S. Beckwith
United States District Judge

October 24, 2002
Date

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

COURT OF APPEALS NO. 02-4266

CRIMINAL NO. CR-1-02-23-3

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
v.	)
	)
ROBERT SCHNEIDER,	)
Defendant.	)
	)

Sentencing Hearing

TRANSCRIPT OF PROCEEDINGS

Before: The HONORABLE SANDRA S. BECKWITH, JUDGE

Date: Thursday, October 24, 2002, 9:07 A.M.

[p. 2]

THE CLERK: Please be seated. Case number CR-1-02-23, Defendant Number 3: United States of America versus Robert Schneider. Would Mr. Schneider and Mr. Rion please approach the lectern?

THE COURT: Good morning.

MR. RION: Good morning, Your Honor.

THE COURT: Mr. Rion, have you had an opportunity to read the Presentence Report in this matter?

MR. RION: I have, Your Honor.

THE COURT: And, Mr. Schneider, have you had an opportunity to read the Presentence Report in this matter?

THE DEFENDANT: Yes, I have.

THE COURT: Have you had an adequate opportunity to discuss the case with Mr. Rion?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: And, Mr. Brichler, good morning.

MR. BRICHLER: Good morning, Your Honor.

THE COURT: Have you had an opportunity to read the Presentence Report in this matter?

MR. BRICHLER: We have, Your Honor.

THE COURT: Okay. Mr. Rion, I note that there are some objections to the report, and in particular -- or at least one --

to paragraph 43 where the Probation Officer [p.3] recommends a two-level enhancement for role in the offense, and, by extension, denial of the safety valve two-level reduction pursuant to Section 2D1.1(b)(6). What would you like to say about that?

MR. RION: Your Honor, there's a few things I think that are important. First of all, in the Plea Agreement on page 3, the Government does not object to the giving of the safety valve, nor did the Government allege that Mr. Schneider had a leadership role in this event.

Secondly, the Probation Officer, when he was looking at whether or not this was a leadership role case, relied in part on Application Note 4 to 3B1.1. Application Note 4 deals with, I believe, the distinction between a two-level or a four-level enhancement; whether he was a manager of the entire operation or whether he should just be given the two-level enhancement, as opposed to whether or not he was a manager in the first place.

Next, I am unaware of any proffer from any defendant that would state that Mr. Schneider was a manager or leader of Mr. Hartman. As the Court's aware, Mr. Hartman and Mr. Schneider have been friends for most of their lives. The Court's aware that Mr. Hartman saw Mr. Schneider making money, and Mr. Schneider saw Mr. Hartman needing money for his kids' college.

The conversation about Mr. Hartman's involvement sort of [p. 4] was the natural extension of their friendship. It was something that Mr. Schneider didn't go to Mr. Hartman and say, "Will you do this for me?" It sort of grew out of a conversation that involved both of them. And to the tell you the truth, I don't think anyone has any recollection exactly

how it happened. But I know that in the proffers, it wasn't stated that Mr. Schneider hired or approached or sought out Mr. Hartman for this.

Obviously, Mr. Hartman received over $5,000 for his involvement. He was paid; he wasn't just doing a favor for a friend. And I just don't see this is a manager-type situation. All it was, was Mr. Schneider and Mr. Hartman agreeing to go and pick these things up. I do not disagree that Mr. Hartman is a lesser -- had a lesser role in this. He clearly did. But he was a knowing participant, and it was by mutual agreement that they decided to do this, and Mr. Hartman's interest was in the money.

The factors that are listed in Note 4 dealing with who controls the assets, who had the most to gain, and those -- the seven factors that are listed, those factors go to whether or not it's a two-point or a four-point enhancement, which no one has said that he should have the four-point enhancement in this case. There weren't that many people involved and he wasn't a manager of the conspiracy as a whole.

[p.5]

My understanding from 3B1.1 is that the Sentencing Guideline Commission created this enhancement because of the possibility that leaders or managers create a greater risk to society and have a greater chance of being recidivists. And because of that, they felt it wise to at least give the Court the power to add extra time to a sentence based upon that increased threat. I don't think that they anticipated two friends having a conversation about making some money and the one tagging along to make some extra money as being the threat that was being perceived.

Second of all, Mr. Schneider defies the risk of recidivism for two reasons: One, I think it's clear that for the majority of life Mr. Schneider had been essentially a drug user. He smoked marijuana for the last 30 years. It was only in the last, short amount of time that he became involved in distribution, and for that he's very sorry.

To counteract the negative things that he has done, for the last seven months, essentially since this case started, he's been volunteering 30 hours a month at a senior center, giving his time and his abilities to help others. He's maintained full employment as -- essentially as a seamstress, working at an upholstery place.

He doesn't fit any type of personality trait or anything that would show that after he's released that he's going to go back to committing crimes.

[p. 6]

He hasn't had a negative urine since this whole case started and he's had no involvement. On top of that, he's cooperated fully with the Government in giving them everything that he has, all the information.

And I think if asked, the Government would agree that he's been almost comically honest in giving all information that he possibly has in the clearest way that he can to them. He has cooperated fully. Because of that, I just don't think that the manager role fits both from a policy perspective from the guidelines, nor from the facts of this case.

I know that the PSI, or the PSR, states that Mr. Schneider approached Mr. Hartman, but I'm just aware after speaking both to the Probation Officer in this case and also the Probation Officer in Mr. Hartman's case -- I'm not aware of

either of them having information that that's in fact how it happened. So, with that I would ask that the Court not give the two-point enhancement for the manager role, and other than that we have no objections to the PSR.

THE COURT: Mr. Brichler?

MR. BRICHLER: Yes, Your Honor. A couple of comments. First of all, with respect to the Plea Agreement, the Plea Agreement took no position as to what his role in the offense was. So, the Government, as far as the Plea Agreement's concerned, left that up to the Probation Department.

[p. 7]

Secondly, we never agreed that he qualified for the safety valve. The Plea Agreement states that we have no objection to being applied should he otherwise qualify. The finding of the Probation Department was that he didn't qualify; therefore, there's really no agreement that he does qualify from the Government.

As far as the role in the offense adjustment, the facts are the facts. The Probation Department, I believe, has done a good job of articulating what occurred here. And I think it's clear, at least from Mr. Hartman's point of view, this Court has already sentenced Mr. Hartman and this Court is aware of what his position was concerning his involvement and how he got involved and so on.

I think it's clear that it was Mr. Schneider that was paying Mr. Hartman. It was Mr. Hartman who was assisting Mr. Schneider. And it was Mr. Hartman who was storing almost $300,000 of cash and scales in his basement for Mr.

Schneider. So, if the facts fit, they fit. I'll leave that up to the Court.

And we have made a motion for reduction of sentence, and I know the Court will later -- at a later time ask me about that, but I wanted to comment on something that Mr. Rion did say, and that was that Mr. Schneider was cooperative, and that's very accurate, he was, and we'll get to that point at the appropriate time.

[p. 8]

THE COURT: Okay. Mr. Rion, anything else you'd like to say?

MR. RION: No, I would agree with the Government's statement. I simply stated they didn't object to the application of the safety valve. I didn't say that they agreed to give it completely with or without qualification, so I would agree with Mr. Brichler.

THE COURT: I thought I'd thumb back through the Presentence Report, because listening to you, it didn't sound like the case I expected to hear this morning. You make it sound as if Mr. Schneider was kind of just a small-time marijuana user who somehow got swept up in this. But the facts indicate that the police recovered $661,489 from Mr. Schneider's home, 25 pounds of marijuana, and Larry Kapp, a codefendant, was responsible for delivering 2100 pounds of marijuana to Mr. Schneider over a period of time; $295,550 in cash was recovered from Douglas Hartman's home which he was holding for Mr. Schneider. So, we have 1.1 million dollars-plus seized then from Mr. Kapp also involved in this. I'm sorry to tell you, but I don't think Mr. Schneider's some small-time user who happened to get caught up in this.

Application Note 6 to Section 3B1.1 provides:

> "In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as 'kingpin' or 'boss' are not controlling. Factors [p. 9] the court should consider include the exercise of decision-making authority, the nature of participation in the commission of the offense, recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others."

The Probation Officer in the investigation report indicated, and Mr. Hartman personally said at the time of his sentencing, that Mr. Schneider called upon Mr. Hartman to help him safeguard his drug proceeds and act as Mr. Schneider's chauffeur.

Mr. Schneider, by far, claimed the lion's share of proceeds from this drug trafficking conspiracy. He acted as the paymaster. He gave Hartman small sums, in comparison to the substantial revenue generated from the conspiracy.

In my opinion, based on what has been adduced in the record, Hr. Hartman acted as Mr. Schneider's employee and Mr. Schneider was Mr. Hartman's manager. I think the two-level increase is appropriate. The record plainly supports that Mr. Schneider was the manager of essentially the entire scheme, so that objection is overruled.

I think the Government has an objection as well -- is that correct, Mr. Brichler? -- to paragraph 32 where the [p. 10] Probation Officer recommends that Mr. Schneider be held

responsible for only 2100 pounds of marijuana, as opposed to the additional 1100 pounds that Mr. Kapp was also holding.

MR. BRICHLER: That's correct. That's based upon our recommendation of the Plea Agreement of the level 32. We felt that the marijuana that was seized in Arizona from Mr. Kapp and his organization should have been attributable to Mr. Schneider, based on the fact that he was receiving shipments between 7- and 800 pounds on four-, five-, six occasions, and the amounts seized out there, I believe, was 1100. It was our opinion that based upon the amount seized and the amounts that he was receiving, that it would have been readily foreseeable to Mr. Schneider that Mr. Kapp would be in possession or have access to 1100 pounds of marijuana. Even if all of it were not coming to Mr. Schneider personally, it was within the realm of foreseeability, and that's what we based our recommendation to the Plea Agreement upon.

THE COURT: Mr. Rion, what would you like to say to that?

MR. RION: And I think the investigation revealed that the operation in Arizona, and any other aspects to it, were completely separate and unknown to Mr. Schneider. Among those separate aspects would be a contact in Kentucky somewhere. It was completely unrelated to this conspiracy [p. 11] here. And I think it was understood that that marijuana that was seized was going to Kentucky. And there's been no evidence presented that Mr. Schneider had any knowledge of the other aspects of the conspiracy in Arizona, particularly the 1100 pounds that was due to go to Kentucky.

THE COURT: Mr. Brichler, anything else you'd like to say?

MR. BRICHLER: No, Your Honor.

THE COURT: Well, I'm inclined to agree with the Probation Officer on this one. There's no evidence in the record that the 1100 pounds that Mr. Kapp was holding in Arizona was in connection with Mr. Schneider necessarily, and there's no way to determine what, if any, part of that was intended for Mr. Schneider, and it's apparent from the record that Mr. Kapp had more than one client to whom he shipped marijuana in bulk. It seems as if this was Mr. Kapp's inventory, but not necessarily a part of his connection with Mr. Schneider. So, I'm going to overrule that objection. Before we go further, let me just review with you the calculation that the Probation Office had in the Presentence Report, and then we can talk about the 5K1.1 motion.

The base offense level for Mr. Schneider is 30. That's based on at least 700 kilograms, but less than 1,000 kilograms of marijuana. His role in the offense as a leader or manager requires a two-level enhancement, [p. 12]a three-level reduction for acceptance of responsibility and timely plea, for an adjusted offense level of 29. His Criminal History Score is zero, which places Mr. Schneider in Category I.

Before considering the 5K1.1 motion, the guideline range is 87 to 108 months in Zone D which requires incarceration, at least four years of Supervised Release, a fine in the amount of 12,500- to $2 million, and a $100 Special Assessment. Does that all sound accurate to you, Mr. Brichler?

MR. BRICHLER: Yes, Your Honor.

THE COURT: Mr. Rion?

MR. RION: Yes, Your Honor.

THE COURT: Mr. Brichler, what would you like to say concerning your 5K1.1 motion?

MR. BRICHLER: Your Honor, we have requested the Court to consider a departure of approximately one-third to level 25, and it's based upon Mr. Schneider's willingness to come in. He gave us a proffer. He laid out the conspiracy, essentially told us where the marijuana was coming from, who was shipping it to him. He gave information concerning another individual who was not indicted in this case who is still the subject of an investigation in Arizona. He was prepared to testify at a trial, should that become necessary. He cooperated inasmuch as he told the investigators who his [p. 13] customer, main customer, was, and a couple of other incidental customers. That information is out there now and it's available, should law enforcement develop any other significant information concerning those individuals, and he is prepared to follow through with any testimony that's required.

THE COURT: Okay. Thank you. Mr. Rion, what would you like to say regarding that motion?

MR. RION: First, just a point of clarification. I believe Mr. Brichler said a third off to a level 25? Or a third off? Maybe I misheard you. I believe that the original plea -- the original understanding we had was that he'd be at 25, but now they say 29. You're suggesting a third off the 29, is my understanding?

MR. BRICHLER: That's the pleading that I filed, Your Honor. His final offense level was 29, and I asked for a third off of his final offense level, which is a 25.

THE COURT: Okay.

MR. RION: Your Honor, all I'd like to say is that Mr. Schneider was, I believe, instrumental. He came forth very early in this case, provided information that I believe led to this case being wrapped up very quickly for all people involved, not only here but with the people involved from Arizona.

We've made attempts to continue the cooperation and to [p. 14] maintain contact with both RENU and the U.S. Attorney's office for any information that they've wanted. There have been no violations, and all information's been truthful.

THE COURT: Okay. I will grant the motion and I will depart downwardly pursuant to that motion according to the recommendation of the Government to level 25. That would reduce the sentencing range from the original 87 to a hundred and eight months, down to 57 to 71 months.

So, what would you like to say concerning an appropriate sentence, Mr. Rion?

MR. RION: If the Court thought that I was trying to minimize the gravity of this, I was not. What I was attempting to say is that for the majority of Mr. Schneider's life, he has not been involved with distribution of marijuana and that he was merely a user up until a relatively short time ago.

The Court's well aware of what's happened in that short amount of time. But before that, he was not involved in distribution.

Mr. Schneider has no criminal record. He's been a law-abiding citizen all of his life, except for the facts that you have before you. On top of that, he's been a volunteer in the

community not only since he's been convicted, but also before this case even came about. Mr. Schneider has always been volunteering at various [p. 15] hospitals around the Christmas season- He would dress up as Santa Claus and he would be the person that the kids would come and sit on his lap.

He was always very instrumental in caring for his family. His parents are very sick and he's been the one that's been the primary caregiver to them. He has maintained employment throughout his life. If the court remembers, this whole case sort of came about when he got laid off while working for an airlines in Dayton. At that point, he needed to supplement his income and then that's what started this whole problem. But for that, I think that he's a very low risk as far as someone that's going to be a recidivist. When he's released from prison, I believe that he will lead a law-abiding life based upon his 30 hours of community service, voluntarily taking on his own part since he's been charged, and based upon his life history of no prior charges or convictions.

I think that the low range, the 57-month, would adequately punish Mr. Schneider due to his age, due to the message that needs to be communicated. Any prison sentence to him will communicate the message that he cannot do something like this again. Fifty-seven months will allow him to make sure that he is not a drug-addicted person when he's released. We would ask that he receive the drug treatment program while in prison, that it'd be recommended from this [p. 16]Court.

As I've said, if we look at the two factors -- risk of recidivism and harm to the community -- his law-abiding life up until his age should show that he's not going to be a harm to the community when released, nor that he would re-offend. I know that Mr. Schneider wants to address you, and that's all I have to say.

THE COURT: Mr. Schneider?

THE DEFENDANT: I would like to apologize to the courts and Your Honor for taking your time. I will spend the rest of my life make amends to my family, to the community, and to God. I selfishly thought only of myself. I want to be a productive member of society again.

I am deeply ashamed of my error in judgment. I'm not a bad person, but made bad decisions. I've never been in trouble before. I want to get on with life. I am sorry I embarrassed and disappointed my parents and family. How lucky I am to have the family I have.

I've learned from working at the Senior Center the last several months how appreciative and thoughtful the elderly are for the smallest gesture of kindness. I was wrong to ever become involved in drugs. I learned how foolish I was wasting my life and energies smoking dope. After 30 years of drug addiction, I wake up fighting the ferocious demons. The constant struggle to remain clean is a battle I win daily. I [p. 17] learned I can be happy without drugs, how nice life really is. I would like to be able to help take care of my elderly, sick parents whose health has deteriorated. My mother has Wett's macular degeneration and her vision is minimal, almost blind. My father is back in the V. A. Hospital receiving Chemo and radiation treatments. I again would like to apologize to the courts and Your Honor. I ask your compassion in this manner. I am truly sorry. I will never have anything to do with drugs again. Thank you, Your Honor.

THE COURT: Mr. Brichler?

MR. BRICHLER: Nothing further, Your Honor.

THE COURT: I'll state my tentative sentence and then give you an opportunity to make any suggestions or comments.

Mr. Schneider has pleaded guilty to Count 1 of the Indictment and he is now adjudged guilty of Count 1, Conspiracy to Distribute in Excess of 1,000 Kilograms of Marijuana, in violation of Title 21, Sections 846(a) (1) and 841(a) (1) and (b) (1) (B) of the United States Code.

My tentative sentence would be that Mr. Schneider be imprisoned for a period of 57 months, to be followed by four years of Supervised Release, on the standard conditions of Supervised Release in the Southern District of Ohio, and those would be set forth in detail in the Sentencing Order.

In addition to the standard conditions, Mr. Schneider [p. 18] would be obliged to obey all federal, state, and local laws; not own a firearm or other dangerous device; not possess a controlled substance, and submit to one drug test within 15 days of his release from prison, and at least two periodic drug tests thereafter.

Mr. Schneider must undergo substance abuse assessment and comply with any treatment, which may include urinalysis testing as recommended by his Probation Officer, and he must pay any unpaid balance of his fine.

I would impose a $10,000 fine, payable immediately. If Mr. Schneider is unable to pay the fine immediately, he may begin to do so through the Bureau of Prisons Inmate Financial Responsibility Program, and he may pay any unpaid balance of his fine during the term of his Supervised Release at a rate and schedule recommended by his Probation Officer and

approved by the Court, and he must pay a $100 Special Assessment immediately.

In addition, the Court would issue today, pursuant to the Plea Agreement and under Title 21 United States Code, Section 853(a), forfeiture of all right, title, and interest of Mr. Schneider in the following property:

> $10,000 in United States currency seized on March 13th, 2002 at the time of Mr. Schneider's arrest;
>
> $661,489 seized from Mr. Schneider's residence on March the 13th, 2002;

[p. 19]

> Two thousand -- two hundred thousand nine -- let me start over -- $295,550 seized from the residence of Douglas Hartman on March 13th, 2002;
>
> $14,205.26 seized from National City Bank Account No. 2831468 in the name of Robert E. Schneider;
>
> $3,067.27 seized from Standard Register Federal Credit Union Account No. 0002066030 in the name of Urban Schneider and Robert Schneider;
>
> $15,503.24 seized from Bank One Account No. 1588601128 in the name of Robert E. Schneider;
>
> $9,695.53 seized from Provident Bank Account No. 2578-550 in the name of Robert E. Schneider;

> $6,091.90 seized from Liberty Savings Bank Account No. 20-54014702 in the name of Robert E. Schneider;
>
> 51,467 -- let me start over -- $51,436.80, the proceeds of Provident Bank Check No. 194346317, in lieu of real property known and numbered as 2519 Walford Drive, Centerville, Montgomery County, Ohio, Zip Code 45440.

A preliminary order of forfeiture would be filed today contemporaneous with the judgment order in this matter.

Comments or suggestions, Mr. Rion?

MR. RION: The only comments, we'd ask also that the Court recommend that he be eligible and the Court recommend that he receive the drug program while in prison. I believe in the PSR, the Probation Department recognizes the long [p. 20] addiction that Mr. Schneider did have to marijuana, and that might be helpful to him while in prison.

THE COURT: Any objection to that, Mr. Brichler?

MR. BRICHLER: No, Your Honor.

THE COURT: I will recommend to the Bureau of Prisons that Mr. Schneider be permitted to participate in the 500-hour intensive drug treatment program. If there are no other suggestions for changes in the proposed sentence, then I would impose the sentence as I stated it.

Mr. Schneider, you have received, I think, a fair sentence, probably a relatively light sentence, considering the amount of marijuana that you participated in distributing. I suppose

when you do that, you close your mind to where that stuff is going and how it can ruin other people's lives. I hope you have some time to think about that.

I will place the Presentence Report in the record under seal. If an appeal is taken, counsel on appeal will be permitted access to the sealed report.

Mr. Schneider, I will allow you to voluntarily surrender, unless Mr. Brichler has an objection to that.

MR. BRICHLER: No objection, Your Honor.

THE COURT: Okay. I want to notify you that you have the right to appeal this sentence, and if you're unable to pay the cost of an appeal, you have the right to apply to [p. 21] this Court for leave to proceed *in forma pauperis*.

If you're indigent and you cannot retain an attorney, you may apply and one would be appointed to represent you in your appeal.

You're further advised, in accordance with the provisions of Rule 4(b) of the Rules of Appellate Procedure, that you must file your notice of appeal with the Clerk of the United States District Court within ten days of the filing of this judgment, and it will be filed today, October the 24th, 2002, and, therefore, you must file your notice of appeal on or before November the 4th, 2002.

If you request, I will direct the Clerk of the Court to prepare and file forthwith a notice of appeal on your behalf- Would you like a notice of appeal filed?

MR. RION: And I'll discuss the option with him. At this time, no.

THE COURT: Thank you. Mr. Schneider, I do want to tell you and remind you that it's important that you continue to abide by all the terms and conditions of your original pretrial release until you surrender, serve your sentence. If you violate any of those terms and conditions, your release may be revoked and you may have to wait to begin serving your sentence in federal prison in a local jail. I assume you would prefer not to do that.

I also want to just tell you that if you fail to appear [p. 22] at the time and place designated by the Bureau of Prisons, that can be a separate federal felony violation. I feel sure Mr. Brichler would present the matter to a grand jury if that happened. If you were indicted and ultimately convicted, I would be the sentencing judge, and you would receive the maximum penalty under the law consecutive to this sentence.

I want to also remind you that while I have given you what I consider to be a very significant break on your sentence, nevertheless you're going to be on Supervised Release for four years after you leave prison. And if you violate any of the terms and conditions of your Supervised Release, you can be sent back to prison for up to four years without any credit for any time already served on Supervised Release, so it behooves you to comply with all the terms and conditions of your Supervised Release.

I don't doubt your sincerity that you want to turn your life around and you don't want to be back here. I just want to be sure you understand what your situation is.

Do you have any questions about your sentence today?

THE DEFENDANT: No, Your Honor.

[p.25]
THE COURT: Counselors, anything more that we need to take up with regard to Mr. Schneider?

MR. BRICHLER: No, Your Honor.

MR. RION: No, Your Honor. Thank you.

THE COURT: Okay.

- - -

PROCEEDINGS CONCLUDED

- - -

CERTIFICATE

I, Mary Ann Ranz, the undersigned, certify that the foregoing is correct transcript from the record of proceedings in the above-entitled matter.

/s/ _____
Mary Ann Ranz
Official Court Reporter

(2)

Supreme Court, U.S.
FILED
DEC 20 2004
OFFICE OF THE CLERK

No. 04-800

In the Supreme Court of the United States

ROBERT SCHNEIDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 04-800

ROBERT SCHNEIDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
Acting Solicitor General

DECEMBER 2004

* The government waives any further response to the petition unless this Court requests otherwise.